same circular a high cost of living allowance was payable in accordance with local awards or as advised by the Central Office, Madras. According to a letter dated the 31st March, 1951, from the Assistant General Manager of the Foreign Department of the defendant at Madras to the Agent of the defendant at Singapore, the high cost of living allowance payable to a clerk at Singapore was $75. Under the defendant's Staff Circular No. 41 of 1949, an oversea allowance was payable to the plaintiff at the rate of 50% of basic salary, i.e., $36.50. The total monthly pay of the plaintiff according to the terms and conditions of oversea service was, therefore, $184.50. In my opinion the plaintiff is estopped from saying that the sum of $184.50 set out in paragraph 5 of the form of application represents his basic monthly pay.

Having come to the conclusion that conditions 12 and 15 formed no part of the contract of employment, I dismiss the claim for arrears of salary based on the basic monthly salary of $184.50 which was unjustifiably inserted by the plaintiff himself in condition 12 of the form of permission, the claim for a gratuity of one month's salary on the completion of every year of service based on condition 12, and the claim for a conveyance allowance based on condition 15.

I dismiss the claim for overtime pay under condition 13 as the plaintiff did not impress me as an honest witness and as he adduced no evidence to corroborate this claim. I am unable to believe that the plaintiff worked overtime for a period of 173 weeks from the 4th June, 1951, to the 1st November, 1954, at an average of 13 extra hours of work per week.

I turn now to the second part of the claim, namely, the claim for damages for breach of contract and wrongful dismissal. Counsel for the plaintiff argued that the contract of employment was not merely for three years but for a limit of five years. He relied on condition 19 in the form of permission which reads:

> "The terms and conditions of engagement shall remain in force for not less than two years and not more than five years from the date of engagement in India, and shall be renewable for further period to be stipulated in writing by the mutual consent of the parties."

In my opinion this condition is qualified by the last line of the form of permission:

> "The period of engagement expires on 23.5.54."

As, however, it was decided in Suit No. 475/55 between the same parties that the contract of employment expired on the 23rd May, 1954, I regard the matter as *res judicata*, and hold that the plaintiff is precluded from contending the contrary of the point found against him in that suit.

Counsel for the plaintiff further argued that the plaintiff was entitled to reasonable notice of termination of his service and that one month's notice was not reasonable as he had not been engaged locally. In my opinion, as the plaintiff was employed on a month to month basis after the termination of the three-year contract, one month's notice of termination of his service was reasonable in the circumstances, and payment of one month's salary and allowances in lieu of one month's notice was all that he was entitled to.

I accordingly dismiss the claim for damages for breach of contract and wrongful dismissal, and order that the plaintiff pay the defendant the costs of this suit.

Claim dismissed.

Solicitors: *Donaldson & Burkinshaw; Braddell Bros.*

ABDUL RAHMAN BIN CHE MAT v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Good JJ.A.) November 2, 1959]

[K.L. — F.M. Criminal Reference No. 4 of 1959]

Courts — Jurisdiction — Magistrate's Court trial presided over by 1st Class Magistrate who is also President, Sessions Court — Sentence exceeding 12 months' imprisonment — Courts Ordinance, 1948, ss.59, 64, 76, 77, 81, 82, 84, 85, 87, 88 and 104 — Criminal Procedure Code (Cap.6), ss.3 and 121.

The powers and jurisdiction of the Magistrates' Court are exercised by the Court but their extent depends on whether at any particular stage of any particular case it is presided over by a First Class or a Second Class Magistrate. In either case it may take cognisance of and exercise jurisdiction in relation to any criminal case falling within section 84 of the Courts Ordinance. If it is presided over by a Second Class Magistrate it may not hold any preliminary inquiry or proceed to the final trial and determination of any cause or matter which does not come within the scope of section 88.

COURT OF APPEAL, Criminal Reference under section 34, Courts Ordinance.

H. L. Wrigglesworth for the appellant.

Mohamed Salleh bin Abas (Federal Counsel) for the respondent.

The judgment of the Court of Appeal was delivered by,

Thomson C.J.: This appeal, which has come before us for re-hearing under the provisions of section 34 of the Courts Ordinance, was originally heard and determined by Neal J., at Kota Bharu.

The appellant was convicted at Kota Bharu for house-breaking by night in order to the committing of theft in contravention of section 457 of the Penal Code, the value of the property involved being something over a thousand dollars. He was sentenced to two years' imprisonment.

He appealed against his conviction on a number of grounds with which we are not concerned here beyond observing that in our opinion they were without substance. He also appealed against his sentence on the ground that the Court in which he was convicted was a Magistrate's Court presided over by a First Class Magistrate and therefore had no power to impose a sentence

exceeding twelve months' imprisonment unless it appeared to the presiding Magistrate that by reason of any previous conviction or of his antecedents a heavier sentence should be awarded and the Magistrate awarding such sentence had recorded his reason for so doing. There was no evidence of any previous conviction nor was there any evidence at all relating to the appellant's antecedents and the only reason recorded by the presiding officer for the sentence imposed was that "the offence is a serious one."

Neal J. dismissed the appeal against conviction for reasons which we need not discuss beyond saying that we agree with them.

As regards the question of sentence he took the view that the Court in which the appellant was convicted was a Sessions Court and not a Magistrate's Court and that therefore the sentence imposed was within the power of the Court. In this connection it is only fair to make it clear that the full facts of the case were not placed before Neal J. He was aware that the functionary who presided over the Court in question had been appointed a Sessions Court President, but he was not aware, and this clearly influenced him to a very great extent, that the same functionary was also by reason of Legal Notification 462 of 1953 a First Class Magistrate. Having come to the conclusion that the Court in question was a Sessions Court and that the sentence imposed was accordingly within its power to impose and being satisfied that the sentence in itself was a suitable one he dismissed the appeal against it but gave his certificate under section 34 to enable the appeal to be reheard by this Court.

By Article 121 of the Constitution the judicial power of the Federation is vested in the Supreme Court "and such inferior courts as may be provided by federal law." The federal law in question is the Courts Ordinance, 1948, which provides *inter alia* for the constitution, jurisdiction and powers of Sessions and Magistrates' Courts.

As regards criminal jurisdiction and powers the provisions of the Ordinance relating to Sessions Courts are simple. By section 59(1) the Yang di-Pertuan Agong may constitute Sessions Courts and by section 59(3) each Sessions Court is to be presided over by a President appointed by the Yang di-Pertuan Agong on the recommendation of the Chief Justice. Section 63 provides that a Sessions Court "shall have jurisdiction to try" the offence specified in that section which generally speaking are all offences for which the maximum term of imprisonment provided by law does not exceed seven years' imprisonment and section 64 sets out the sentences which "a Sessions Court may pass." Again generally speaking, the maximum sentence of imprisonment which any Sessions Court may pass is one of three years. Out of respect to the views of the learned trial Judge we would add in parenthesis that we see nothing in section 61 of the Ordinance which affects the position as it has been stated in any way. That section is expressed to be "subject to the provisions and limitations contained in this Ordinance" and so cannot operate to extend by reference the jurisdiction and powers of Presidents beyond the limits imposed by the Ordinance itself.

As regards Magistrates' Courts the provisions of the Ordinance are not quite so straightforward for the reason that provision is made for the holding of Magistrates' Courts by Magistrates of two different classes with different powers.

Section 76 provides that the Yang di-Pertuan Agong may constitute Magistrates' Courts. Section 77 provides that the persons for the time being holding certain specified offices shall by reason of holding these offices be First Class Magistrates. These offices by reason of Legal Notification 462 of 1953, which has already been mentioned, include the offices of Presidents of Sessions Courts. Section 79 provides that the Rulers and Governors may appoint Second Class Magistrates.

I pause at this stage to observe that nowhere in the Ordinance is there any provision corresponding to section 3 of the former F.M.S. Courts Enactment which constituted and differentiated between the Court of a First Class Magistrate and the Court of a Second Class Magistrate. There is only one type of Magistrate's Court, that is the Courts constituted under section 76 of which the Magistrate's Court at Kota Bharu is one (see Gazette Notification 4033/48).

To proceed, section 81 provides that any Magistrate of either class "may sit in any Magistrates' Court" within the local limits of his jurisdiction and section 82, which is of crucial importance, provides that a Magistrate's Court constituted under the Ordinance (i.e. constituted as such) shall, for all purposes, be deemed to be the Court of a First Class Magistrate and shall "have" (i.e. the Court shall have) all the "powers and jurisdiction conferred on a First Class Magistrate by this Ordinance," always provided that a Second Class Magistrate shall not hold any preliminary inquiry or proceed to the final trial and determination of any case which he is not given power to try by section 88.

Section 88 provides that a Second Class Magistrate shall only have jurisdiction to try offences for which the maximum term of imprisonment provided by law does not exceed twelve months or which are punishable with fine only and section 89 sets out the maximum sentences which a Second Class Magistrate has power to impose.

Section 85, on the other hand, provides that a First Class Magistrate shall have jurisdiction to try offences for which the maximum term of imprisonment provided by law does not exceed three years or which are punishable with fine only and offences under a number of specified sections of the Penal Code including section 457,

provided that if he is of the opinion that in the circumstances of any case his powers of punishment would be inadequate in the event of a conviction he shall take steps to transfer the case for trial to a Sessions Court for doing which provision is made under section 104. His powers of punishment are set out in section 87 which provides that he may pass a sentence of imprisonment not exceeding twelve months, but where he has convicted any person and it appears that by reason of previous convictions or antecedents a punishment in excess of twelve months' imprisonment should be awarded then he may award the full punishment authorised by law for the offences of which such a person has been convicted and shall record his reasons for doing so. The maximum sentence authorised by section 457 of the Penal Code for house-breaking by night in order to the committing of theft is fourteen years.

In our opinion no useful purpose is to be served by attempting to draw a theoretical distinction between the powers and jurisdiction of a Magistrate's Court and the powers and jurisdiction of the Magistrate presiding over it for the time being if only because by reason of section 82 the powers and jurisdiction of the Court and of the Magistrate are the same and because there is no provision in our law for the trial of offences otherwise than by a Court having jurisdiction to do so (see Criminal Procedure Code sections 3 and 121). The meaning of the sections of the Courts Ordinance which have been quoted clearly is that the powers and jurisdiction of the Court are exercised by the Court but their extent depends on whether at any particular stage of any particular case it is presided over by a First Class or a Second Class Magistrate. In either case it may take cognisance of and exercise jurisdiction in relation to any criminal case falling within section 84. If, however, it is presided over by a Second Class Magistrate it may not hold any preliminary inquiry or proceed to the final trial and determination of any cause or matter which does not come within the scope of section 88.

In the present case it seems clear that the appellant was tried in the Magistrate's Court at Kota Bharu which at the actual trial was presided over by a First Class Magistrate. He was originally arrested by the Police without warrant and on 17th January was brought up on a Charge Sheet headed "In the Magistrate's Court at Kota Bharu" before one Che' Ismail, who is a Second Class Magistrate. The case was adjourned to 18th March for hearing and the appellant was released on bail. On 18th March he appeared on the same Charge Sheet and it is stated in terms on the record that where he appeared again was "In the Magistrate's Court at Kota Bharu" which was on that occasion presided over by Che' Harun who is a Sessions Court President but is also *ex-officio* a First Class Magistrate. The trial then proceeded and the appellant was convicted and, as has been said, was sentenced to two years' imprisonment. Throughout the record there is not a word to suggest that Che' Harun was presiding over a Sessions Court. There is no suggestion that any order was made under the proviso to section 85 to have the case transferred for trial to the Sessions Court from the Magistrate's Court in which it commenced. In the circumstances the conclusion is inescapable that the proceedings began, continued and terminated in the Magistrate's Court. That being so, in the absence of any evidence as to antecedent or previous convictions the maximum sentence which could be imposed was one year's imprisonment.

We therefore allow the appeal to the extent of setting aside the sentence of two years' imprisonment and imposing in its place a sentence of one year's imprisonment.

Order accordingly.